STATEMENT

It is deemed appropriate to disclose additional facts to the Court as supplementary to those statements contained in the appellants' jurisdictional statement so that this Court may have a more complete objective portrait of the stature of this case.

The appellants consist of nine Canadian processors and exporters and two American importers and distributors of a commercial food flatfish scientifically known as Reinhardtius Hippoglossoides. These appellants have labeled, distributed and sold this fish as "Greenland Halibut" in various areas of the United States during the past few years. Prior to that time it was not considered to be generally marketed as a food fish in this country. The record discloses, and it is admitted by the parties, that the supply of this flatfish marketed in this country is obtained off the shores of Newfoundland, Canada, rather than from any area contiguous to Greenland.

A further matter which the appellants have left unsaid in their jurisdictional statement is the fact that they concede the so-called "Greenland Halibut" is not physically or chemically the same as "true" halibut, that is, the species known as Pacific and Atlantic halibut. In fact the appellants openly admitted to the trial court that they recognized it would be improper to label or offer their food fish as halibut, alone, but that they deemed it permissible and proper to call this fish "Greenland Halibut."

ARGUMENT

The decision of the trial court is unequivocally correct and should be affirmed summarily. The following should buttress this conclusion.

1. There is no basis upon which to find that Reinhardtius Hippoglossoides is commonly known as "Greenland Halibut" in the marketing of such as a food fish to consumers.

An analysis of the appellants' jurisdictional statement reveals the underlying hypothesis of their claims. Simply stated, they contend that the terms "Greenland Halibut" constitute a common name for this genera of flatfish regardless of its physical or chemical characteristics, and that recognition of this common name has been given by the scientific community engaged in the identification and classification of fish. Based upon this recognition, the appellants then claim the United States governmental authorities, namely the Food and Drug Administration, have consented that such should be the common name in the marketplace. As this federal agency is charged with the responsibility of eliminating the use of mislabeling or deceptive terms, the appellants claim this necessarily resolves any dispute as to the propriety of the terms "Greenland Halibut" in their favor. The appellants thereafter attempt to support such conclusion further by alluding to motivation for such state legislation, thus inferring that the legislative purpose is to protect a "local" fishing industry, rather than to protect Oregon consumers so that they might be apprised of the food products they are purchasing.

Probably the most significant and impressive rebuttal to such proposals of the appellants, and convincing evidence of the error inherent in their conclusions, is the fact that the federal Food and Drug Administration, the very same agency relied upon by the appellants so heavily, *has now made a formal finding and ruling that Reinhardtius Hippoglossoides should not be called "Greenland Halibut" as this name is misleading to the consumer,* but rather should properly be called and labeled as either flounder or northern flounder. The findings and ruling of such agency were promulgated and published, as by law required, under date of August 1, 1968 at 33 Federal Register 11813 (No. 163). This finalized posture of this federal agency is clearly contrary to the "advisory" position relied upon by the appellants. The full text of this Food and Drug Administration ruling is appended hereto as Appendix A.

Reference is once again made to the tenor of the appellants jurisdictional statement. Without the reliance upon the posture of the Food and Drug Administration, the whole thesis of the appellants disintegrates. As stated earlier, the principal issue to be determined is whether the terms "Greenland Halibut" can justifiably be considered as a common name in the marketing of a flatfish recognized not to be the same as "true" halibut. The scientific nomenclature of various species or genera of fish is only of assistance if in fact the same nomenclature is accepted by the consumer community as well as the scientific community. The above mentioned federal agency, whose function in this area of investigation is

to determine common names which will not be deceptive or misleading to the consuming public, has spoken with finality and agreed with the State of Oregon as to the proper terminology, and with the decision of the District Court for the District of Oregon.

In setting forth the rationale supporting its ruling, the Food and Drug Administration effectively reiterated the views of the trial court in the present cause and removed any possible justification for judicial acceptance of the terms "Greenland Halibut" as a common name for the Reinhardtius Hippoglossoides in the marketplace.

> "There is now, however, sufficient information available to the Administration to show that the ordinary individual who prefers the true, and more expensive, halibut may purchase fish labeled as 'Greenland Halibut' under the impression that it is a kind of halibut, which is not the case." Appendix A, p. 13.

2. This Court should not exercise its plenary jurisdiction for the purpose of evaluating the findings of fact of the trial court.

In an apparent effort to impress this Court with the importance of their allegations of unconstitutionality, the appellants have devoted a substantial amount of verbage to an attack upon the findings of fact of the trial court. Additionally, the appellants request this Court to review the admissibility of two exhibits (Appellees' exhibits # 34 and 41), but it is assumed that this latter question needs no response in light of the well established and known scope of review of this court.[1]

[1] It is of interest to note that the appellants rely upon the questioned exhibit #34 some seven times in their jurisdictional statement in an attempt to support their own contentions.

Demonstrative of the attacks upon the trial court's findings of fact is the claim that "true" halibut dealers, assumedly located in Oregon, were instrumental in the passage of this type of regulatory law in the states of Washington and Massachusetts as well as in Oregon.[9] (Jur St, pp. 10-11) The trial court found as a fact that

> "* * * It [the statute] does not discriminate against interstate commerce or favor local competitiors. 'Halibut' is not a product of Oregon fisheries." (Jur St, p. 34)

The record in this cause will disclose that there is not a scintilla of evidence to support the appellants' claims in this regard. Further, there is not, nor has there ever been, any issue of due process so that the legislative motive might be justifiably investigated.

Additional attacks upon the findings of fact of the trial court are set forth in the extensive so-called analysis of the decision. (Jur St, pp. 12-15) Further examples gleaned from this dissertation would serve no enlightening purpose. Suffice to say that such attacks are clearly erroneous in fact and evidence no persuasive reasons for setting aside the factual findings.

This Court has consistently held that it shall not review or reverse the factual findings of a trial court without some showing that they are "clearly erroneous."

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[9] Massachusetts passed a similar law on July 9, 1968, more than three months after the trial court's decision herein.

This principle was best enunciated in the case of *Commissioner v. Duberstein*, 363 US 278 at 289-291 (1960)

> "Where the trial has been by a Judge without a jury, the Judge's findings must stand unless 'clearly erroneous'. Fed. Rules Civ. Proc. 52(a)."

See also *Rudolph v. United States*, 370 US 269 (1962) at page 270, and the cases cited therein.

3. The decision of the trial court is in complete accord and conformity with the clear and consistent holdings of this court upon the constitutional questions as here presented.

The following commentary should remove any doubt that the issues presented by the appellants have not only been correctly determined by the trial court, but that the contentions of the appellants on this appeal lack the necessary import and substance.

Initially, it should be emphasized that the Oregon statute under consideration does not reserve to one genera of flatfish the use of the term "Halibut," but rather reserves the utilization of this name in the marketing process in Oregon to those classifications of flatfish which the consumer has come to know and consider as "halibut" namely the Atlantic halibut and the Pacific halibut. The reason for reasserting here that which is readily apparent in the statute is the fact that the total argument of the appellants as to constitutionality rests upon this Court accepting the erroneous view that local, Oregon, economic interests are the intended beneficiaries of the statute, not the Oregon consumers. Should the ap-

pellants be successful in such attempt, their bases for attacks under the Commerce Clause, Equal Protection Clause and Supremacy Clause of the U. S. Constitution might have some logical persuasion. However, the appellants attempt to "stretch" the clear statutory language in order to allude to some monopolistic consequence of the enactment, can only be described as imaginative.

The three constitutional complaints are refuted separately hereafter.

(a) The XIV Amendment to the U. S. Constitution has been properly considered in this cause by the trial court. The classification in question bears a "rational relationship to a legitimate regulatory interest," that is the protection of the Oregon consumers from deception in food purchases. See *Florida Lime & Avocada Growers, Inc. v. Paul,* 373 US 132 (1963). Having found significant differences between "true" halibut and the so-called "Greenland Halibut" the trial court determined the classification reasonable and, as stated in *Puget Sound P. & L. Co. v. Seattle,* 291 US 624 (1934),

> "The equal protection clause does not forbid discrimination with respect to things that are different."

The application of such long standing principles has continuously been made by this Court and it is clearly evident that the appellants have failed to sustain the burden of proving the classification is an unreasonable one, *Madden v. Kentucky,* 309 US 83 (1939), or that the statutory purpose is not a legitimate use of the police power of the state. *Huron Portland Cement Co. v. City of Detroit,* 362 US 440 (1960). The attempted analogy by the appellants

to relegate the state's police power to that power enjoyed by a competitive business enterprise, and thereby allow reliance upon such cases as *Sears Roebuck & Co. v. Stiffel Co.*, (Jur St, p. 16), is again an imaginative approach but can be of no assistance to the appellants as it simply is a completely erroneous application of legal principles germane to a consideration under the Equal Protection Clause.

(b) Article VI of the U. S. Constitution is also not violated by the attacked Oregon enactment. The appellants' contention that federal pre-emption exists by virtue of the terms of the federal Fair Packaging and Labeling Act, 15 U.S.C. #1451-1461, is patently erroneous. As the trial court readily observed, the Act only supersedes state laws in regard to "* * * *the labeling of the net contents of the package* * * *." (emphasis quoted) See: Jur St, p. 34. The appellants once again are thereby forced to turn to the position and attitudes of the Food and Drug Administration for any pre-emptive activity. As so positively stated by this federal agency, its position *is the same as* the requirements of the Oregon law. The historical cases such as *Thurlow v. Massachusetts*, 46 US 504 (18947), *Cooley v. Board of Wardens*, 53 US 299 (1851), as well as recent decisions such as *Swift & Co. v. Wickham*, 364 F2d 241 (2d Cir., 1966), cert. den. 385 US 1036 (1967), *Florida Lime & Avocado Growers, Inc. v. Paul*, supra, express unequivocal principles which allow only the conclusion that no pre-emption exists in this instance.

(c) Article I, Section 8, of the U. S. Constitution does

not prohibit otherwise valid state regulation of commercial activity merely because it affects interstate commerce in some manner. *Hygrade Provision Co. v. Sherman*, 266 US 497 (1925), *Huron Portland Cement Co. v. City of Detroit*, supra. As stated previously, this Oregon law relates to the protection of the Oregon consumers, not to the protection of the Oregon fisheries. It is very apparent that no economic barriers are, or need be, established by this law inasmuch as there is no fishery to be protected. Accordingly, this state enactment is not subject to scrutiny under the concepts set forth in the cases of *Baldwin v. Seelig, Inc.*, 294 US 511 (1935), *Polar Ice Cream & Creamery Co. v. Andrews*, 375 US 361 (1964) and other like cases, in which the apparent and open legislative purposes were to protect some part of local industry.

A host of decisions of this Court have upheld the validity of state regulatory laws incidentally affecting interstate commerce. Some of the more notable are *Standard Stock Food Co. v. Wright*, 255 US 540 (1912), *Hutchinson Ice Cream Co. v. Iowa*, 242 US 153 (1916), *Armour & Co. v. North Dakota*, 240 US 510 (1916), *Pacific States Box & Basket Co. v. White*, 296 US 176 (1935), and *Huron Portland Cement Co. v. City of Detroit*, supra. Additionally, it should be very clear that this Oregon act places no affirmative limitations upon the terminology which might be used instead of "Greenland Halibut." Rather, the act contains only the minimal regulation to effectuate the legislative purpose. Consequently, this enactment is in accordance with the prin-

ciples declared in *Dean Milk Co. v. Madison*, 340 US 349 (1950), not in contravention to such as claimed by the appellants.

The claimed interference with interstate commerce is so remote and inconsequential as to be devoid of any constitutional significance.

CONCLUSION

For the foregoing reasons, the appellees submit that the judgment of the United States District Court for the District of Oregon be affirmed.

Respectfully submitted,

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APPENDIX A

TITLE 21—FOOD AND DRUGS

Chapter I—Food and Drug Administration, Department of Health, Education and Welfare

Subchapter A—General

PART 3—STATEMENTS OF GENERAL POLICY OR INTERPRETATION

Common Name for Food Fish of the Species Reinhardtius Hippoglossoides

Under the authority vested in the Secretary of Health, Education, and Welfare by the Federal Food, Drug, and Cosmetic Act (secs. 403(b), 701(a), 52 Stat. 1047, 1055; 21 U.S.C. 343(b), 371(a) and delegated to the Commissioner of Food and Drugs (21 CFR 2.120), the following new section is added to Part 3:

§ 3.70 "Flounder" or "northern flounder" is the common name for food fish of the species Reinhardtius hippoglossoides.

(a) The food fish commonly known as "halibut" is a member of the species *Hippoglossus hippoglossus* (caught in the Atlantic Ocean) or the species *Hippoglossus stenolepis* (caught in the Pacific Ocean). The name "Greenland halibut" has been accepted in the scientific community as the name for food fish of the species *Reinhardtius hippoglossoides,* which is a variety of the fish commonly known as flounder. For this reason the Food and Drug Administration in the past has not objected to the use of the name "Greenland halibut" in the

labeling of this species of fish. There is now, however, sufficient information available to the Administration to show that the ordinary individual who prefers the true, and more expensive, halibut may purchase fish labeled as "Greenland halibut" under the impression that it is a kind of halibut, which is not the case.

(b) The Food and Drug Administration therefore concludes that the food fish of the species *Reinhardtius hippoglossoides* labeled as "Greenland halibut" or with any other name which includes the word "halibut" is misbranded within the meaning of section 403(b) of the Federal Food, Drug, and Cosmetic Act. The labeling of such fish shall bear either the name "flounder" or, since the species is caught only in circumpolar waters, the name "northern flounder."

(c) The Food and Drug Administration will consider appropriate regulatory action regarding such misbranded fish shipped in interstate commerce if the act of misbranding the fish occurs after 90 days following the date of publication of this section in the Federal Register.

(Secs. 403(b), 701(a), 52 Stat. 1047, 1055; 21 U.S.C. 343(b), 371(a))

Dated: August 13, 1968.

Herbert L. Ley, Jr.,
Commissioner of Food and Drugs.

[F.R. Doc. 68-10070; Filed Aug. 20, 1968; 8:51 a.m.]